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IN THE

Supreme Court of the United States

October Term, 1955

No. 457

B. B. CARTER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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(NOTE: In above index and text, the notation "(1939)" refers to Internal Revenue Code of 1939, to distinguish same from Internal Revenue Code of 1954. In provisions cited no substantial change occurs in the different codifications but sections were renumbered. The title is Title 26 in both.)

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, B. B. Carter, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on June 30, 1955.

OPINIONS BELOW

The opinion of the District Court is unreported and is printed in the Appendix hereto (infra, 1a). The opinion of the Court of Appeals is not as yet reported and is printed in the Appendix hereto (infra, 10a).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 30, 1955 (infra, 13a, R. 554). A timely petition for rehearing filed on July 19, 1955 (R. 555) was denied on August 12, 1955 (infra, 13a, R. 584). By order of this Court dated September 6, 1955 the time to file petition for writ of certiorari was extended to October 10, 1955.

The jurisdiction of this Court rests on 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Is an accused deprived of the assistance of counsel required by the Sixth Amendment to the Constitution when he enters a plea of guilty while represented by an attorney who had voluntarily furnished the government information leading to the very prosecution and charges upon which he is then and there arraigned?

2. Is an accused denied the due process of law guaranteed by the Fifth Amendment to the Constitution and deprived of rights under the Sixth Amendment by the action of the trial court in accepting an alleged plea of guilty to a charge of willfully attempting to evade and defeat income tax when the accused contemporaneously denies that he acted willfully, knowingly and intentionally?

3. When the rights of an accused under the Fifth and Sixth Amendments to the Constitution have been violated may the trial court exercise discretion to deny a motion to withdraw a plea of guilty by invoking the principles of equity that would apply in a civil controversy?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF PROCEDURE INVOLVED

Article V of the Amendments to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Article VI of the Amendments to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of Counsel for his defense."

Section 145 (b) of the Internal Revenue Code of 1939, 26 U.S.C., Section 145 (b):

> Failure to Collect and Pay over Tax, or attempt to Defeat or Evade Tax.—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or de-

feat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Section 276 (a) of the Internal Revenue Code of 1939, 26 U.S.C., Section 276 (a):

"(a) False Return or No Return.—In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."

Section 3748 (a) of the Internal Revenue Code of 1939, 26 U.S.C., Section 3748 (a):

"(a) Criminal Prosecutions.—No person shall be prosecuted, tried or punished, for any of the offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense * * * except that the period of limitation shall be six years—

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner,

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof, * * *"

Rule 11 of Federal Rules of Criminal Procedure:

"A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere.

> The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty."

Rule 32 (d) of Federal Rules of Criminal Procedure:

> "(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice, the court after sentence may set aside the judgment of the conviction and permit the defendant to withdraw his plea."

STATEMENT OF THE CASE

Petitioner, B. B. Carter, is a farmer and rancher, who has had little education and no training and experience in the keeping of books and records. His tax returns for the years 1940 to 1950 were prepared by Walter G. Russell, a tax attorney and Certified Public Accountant, from cancelled checks, bank statements, duplicate deposit slips and oral information. After the returns were prepared and certified to by Russell, petitioner signed the returns as instructed, gave Russell a check for whatever Russell said was due and Russell filed the returns (R. 68-76).

In the latter part of 1946, Russell, without petitioner's knowledge, contacted an agent of the government and voluntarily imparted to him information to the effect that petitioner was not paying all of his income tax. (R. 196, 252, 253, 327). This action by

Russell caused a fraud investigation to be made of petitioner's tax returns. (R. 257, 260). Petitioner first learned of this investigation in July or August, 1947, when a revenue agent contacted him at his home requesting certain information (R. 74). Petitioner obtained this information and transmitted it to Russell, whom he instructed to rework all of his tax returns, so that he could know if he owed any additional tax (R. 75). Russell agreed to do this but never did (R. 329, 330). Later a special agent contacted petitioner and took a statement from petitioner regarding his tax liability (R. 78).

Petitioner heard nothing further of the investigation until January, 1949, when he received in the mail, the confidential report of the revenue agent and special agent who had conducted the examination of his tax returns. Attached to this report were the original reports of every statement taken by the agents during the course of the investigation and all of petitioner's income tax returns for the years involved (R. 81). This report contained the following statement pertaining to the origination of the investigation (R. 87):

> "Mr. Walter G. Russell, Certified Public Accountant and attorney, Amarillo, Texas, contacted Internal Revenue Agent's office in Amarillo, Texas, and advised them that Mr. Carter had apparently boasted about not paying all his income tax and implied that he had purchased a ranch from income that did not pass through his bank account."

After reading the report, petitioner took it to Russell and asked Russell if it were true that he had turned petitioner in to the government. Russell denied this

vehemently even to the point of using profanity, stating (R. 81):

> "They are — — liars, there is not a word of truth in them, they will do anything to get a man in trouble."

Russell's testimony is in conflict. He testified that in January, 1949, petitioner merely left the report and that Russell didn't even look at it at that time, and that he and petitioner did not discuss it until after March 15, 1949. It was Russell's testimony that when asked about the statement regarding the investigation he said (R. 333, 334).

> "And I explained to him, I said, 'All I knew to say was that this was the rumors,' which I had been told about him, and about which I had previously informed him and I had discussed with the revenue agents."

Russell testified that when he made this explanation petitioner merely said "Oh," and they proceeded with the examination of the report (R. 335).

Petitioner accepted Russell's denial in 1949 and permitted Russell to prepare his 1948, 1949 and 1950 tax returns. In November, 1949, petitioner was notified that his returns were being sent to the Penal Division, Washington, D. C. with the recommendation that criminal prosecution be instituted (R. 139, 141). Petitioner discussed the matter with Russell and asked Russell to represent him. Russell recommended his employee, Arthur Glover. Glover, an attorney, did not accept employment in the case until January, 1950 (R. 339-342). Sometime between November, 1949 and January 1950, when Glover accepted the case, Russell made Glover a partner in his law firm. Petitioner

paid a retainer of $5,000.00 in the form of a check written out by Russell, payable to Russell, and signed by petitioner (R. 342, 393). Petitioner then turned over to Glover the confidential report (R. 89, 397).

Glover then represented petitioner before the Treasury Department and the Department of Justice in an effort to dissuade the government from instituting criminal proceedings. He filed a brief, in which the primary defense urged by Glover was that if there were any omissions of income from petitioner's returns, these omissions occurred as a result of carelessness, negligence and the shortage of help in the accounting office of his law partner, Russell. Glover's efforts failed and the case was referred to the United States Attorney for the Northern District of Texas with instructions to institute criminal proceedings (R. 404-409).

While conceding that petitioner would never admit his guilt, Glover decided in his mind that petitioner should plead guilty (R. 414). In reaching this conclusion one factor considered by Glover was that the government would compel his law partner, Russell, to answer a subpoena and to give as a witness for the government all information that he had in his files (R. 403, 404).

Glover held a conference with the United States Attorney at which he advised the government, that he did not know what he could do in regard to a plea, but would let them know (R. 205). He contacted petitioner the next day and urged him to enter a plea of guilty. Admitting petioner's innocence (R. 169, 427), Glover nonetheless insisted that he plead guilty as the easiest way out and to avoid vicious publicity that would hurt his family (R. 102, 103, 427, 428). Reluc-

tantly petitioner complied and the next day advised Glover that he would plead guilty (R. 428).

Several days later on January 17, 1951, petitioner accompanied by Earl Riffe, a grain dealer of Stratford, Texas, and A. L. Wilson, the Sheriff of Sherman County, Texas, as character witnesses, came to Dallas with Russell and Glover as his attorneys (R. 430, 500). Arriving at Dallas they went to the Federal Building where petitioner, Riffe and Wilson were seated on a bench in a corridor on the third floor, between the United States Attorney's office and the court room (R. 157, 500). Glover and Russell then had a conference with the Assistant United States Attorney, Cavitt Binion (R. 430, 475). There is some dispute about whether petitioner attended this conference. Glover and Russell testified that he did (R. 430, 346, 327). Cavitt Binion had no recollection of the matter (R. 284), and petitioner (R. 157) and A. L. Wilson categorically denied that petitioner attended this conference (R. 500, 501). Wilson stated that petitioner never left his side until they went into the court room (R. 505).

When the case was called, Russell and Glover entered their appearances for petitioner (R. 8). First the information (R. 7) charging petitioner with tax evasion for the years 1944, 1946 and 1947 was read and petitioner was asked if he waived indictment (R. 8, 9). Then the information was read to petitioner and the Court inquired whether petitioner's plea was guilty, or not guilty, to which petitioner answered, "Yes, sir." Thereupon the Court stated: "Guilty", and petitioner responded, "Guilty" (R. 10, 11).

The Court then heard from the United States Attorney after which Glover made a statement on behalf

of petitioner. In his statement Glover referred repeatedly to petitioner's accountants and petitioner's attorneys (our office), but failed to inform the Court that petitioner's accountant and petitioner's attorney were the same person, who was then in Court representing petitioner (R. 18, 19).

Two character witnesses testified on behalf of petitioner, after which the Court asked petitioner for an explanation and he stated (R. 23):

> "Judge, I haven't denied any time owing this tax to these boys, and I didn't know at the time my tax was turned in that I owed it, then. I just forgot to turn it in, I didn't keep any books, and I didn't know anything about it, that is all I have got to say about it."

The Court then discussed the case of another defendant after which the following occurred (R. 24, 25):

> "* * * We never want a man, *in* after years, however, to say that he got in trouble and he wasn't guilty, but he just plead guilty to get out of it, it was the easiest way. We feel sure your lawyer would not back that up, and we want to know if you feel that way about it?
>
> "The Defendant: I don't understand that, Judge?
>
> "The Court: I will state it to you in a different form. The Court never wants any man to plead guilty unless he feels himself to be guilty, and if you feel yourself to be innocent, then we think you should be tried, and tried by a jury.
>
> "The Defendant: I think I am guilty through neglect of my business, Judge, that is the only reason I am pleading guilty.

"The Court: You mean to say you are not willfully guilty, and did not intentionally break the law?

"The Defendant: No, sir, I did not intentionally do it, no, sir."

Without any further interrogation of defendant the Court discussed several matters not pertinent to petitioner's understanding of the case and then the Court stated (R. 27):

"It looks like you did that intentionally. By the time though that you get your delinquent tax all paid, you are going to be left almost a poor man again. The Court does not quite find it in his heart to send you to the penitentiary, yet, the circumstances justify a considerable punishment by way of a large fine."

The Court imposed a fine of $10,000.00, which petitioner paid and Judgment and Commitment was entered (R. 29).

Petitioner continued to employ Russell and Glover as his attorneys until August, 1951. At that time he employed another attorney to handle certain legal matters pertaining to the foreclosure on property which petitioner owned (R. 90, 107, 160). In February, 1954, petitioner employed counsel to examine his tax situation, who upon learning the facts of the situation advised petitioner of his constitutional rights. In April, 1954 petitioner filed a motion to withdraw his plea of guilty (R. 30). Hearing was held on the motion on May 24, 1954 (R. 66-519). On October 30, 1954 the District Court rendered an opinion and entered an order denying petitioner's motion (infra, 1a-9a).

The District Court found that Russell's actions were unethical and that since he had "turned in his client to be prosecuted," Russell should not have accepted employment to defend him (infra, 5a). Yet on the ground that the wrong done lay between petitioner and his counsel, the Court refused to rectify the violation of petitioner's rights in the criminal charge brought by the United States. In so doing it based its exercise of discretion on the same principles of equity that would apply in a civil controversy (infra, 9a). The denial of the motion was based on unreasonable delay, which allegedly permitted the limitation to run on the government's claim for taxes and that because of the delay the government's witnesses may have become unavailable (infra, 9a). There is no evidence of record that any of petitioner's witnesses have become unavailable or that the delay has prejudiced petitioner's case in any way. The opinion did not discuss petitioner's constitutional rights and made no reference to petitioner's specific denial at the time he entered his plea of guilty that he acted willfully, knowingly and intentionally.

A timely appeal was filed with the Court of Appeals for the Fifth Circuit, which Court on June 30, 1955 rendered an opinion and entered judgment affirming the action of the District Court (infra, 10a). A timely petition for rehearing was denied on August 12, 1955 (infra, 13a). The Court of Appeals did not discuss factual errors in the District Court's opinion brought to their attention by petitioner but based its determination on the facts found by the District Court. The Court of Appeals did not discuss petitioner's constitutional rights and made no reference to petitioner's specific denial at the time he entered his

plea of guilty, that he acted willfully, knowingly and intentionally. It based its decision on a conclusion that if petitioner were permitted to withdraw his plea of guilty, he could plead the statute of limitations against further prosecution, or in the alternative, reclaim some of the taxes and penalties he had been required to pay (infra, 12a).

REASONS FOR GRANTING THE WRIT

I.

The Decision of the Court of Appeals Denying an Accused the Assistance of Counsel Is in Conflict With the Decisions of This Court and, If Permitted to Stand, Will Open the Door to Cumulative Losses of Constitutional Rights

When petitioner stood before the Court charged with the commission of a felony he was represented by two law partners. One of these attorneys, Russell, was the individual who had prepared the tax returns which were alleged to have been fraudulently filed and who had counseled petitioner in tax matters. He had voluntarily imparted to the government information which caused the investigation and which formed part of the basis of the charge which petitioner was called upon to answer. The other attorney, Glover, who spoke on behalf of petitioner had been an employee of Russell and was made a partner at the time representation of petitioner in his tax fraud case was under consideration. Prior to the institution of criminal proceedings, Glover had urged as a defense that the omissions in petitioner's returns were due to the carelessness and negligence of his law partner's accounting office. In deciding whether to urge petitioner to enter a plea of guilty, Glover considered the fact that his law partner, Russell, would be called as a witness by the government if the case went to trial.

It is most serious for a defendant to be without a lawyer; it is a good deal worse for a defendant to have lawyers who are not wholly dedicated to his cause and who have interests in the case adverse to that of their client.

In *Von Moltke* v. *Gillis,* 332 U.S. 708, 68 S. Ct. 316, which involved a plea of guilty to conspiracy to violate the Espionage Act of 1917, the Court defined adequate counsel as follows at page 725:

> "The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client.
>
> * * * * *
>
> "The Constitution does not contemplate that prisoners shall be dependent upon government agents for legal counsel and aid, however conscientious and able those agents may be. Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes [redacted] provision."

This kind of assistance of counsel petitioner did not receive. The decision of the Court of Appeals is also in conflict with *Johnson* v. *Zerbst,* 304 U.S. 458, 58 S. Ct. 1019; and *Glasser* v. *United States,* 315 U.S. 60, 62 S. Ct. 457.

II.

The Decision of the Court of Appeals Permitting the Plea of Guilty to Stand Gives Sanction to a Denial of Due Process and the Right to a Trial Guaranteed by the Constitution and Stands as a Threat to Constitutional Rights

That willfulness and intent are essential elements of a charge of willfully attempting to evade and defeat taxes under Section 145(b) of the Internal Revenue Code of 1939 is not subject to question. In *Holland*

v. *United States,* 348 U.S. 121, 75 S. Ct. 127, this Court states with reference to the offense in question:

> "A final element necessary for conviction is willfulness. The petitioners contend that willfulness 'involves a specific intent which must be proven by independent evidence and which cannot be inferred from the mere understatement of income.' This is a fair statement of the rule."

After first answer "Yes, sir." to the Courts query, "Is your plea guilty, or, not guilty?" the Court said "Guilty," and petitioner responded, "Guilty." (R. 11) Thereafter, petitioner made no statement that could in any way be construed as an admission of guilt, but in response to questions of the Court he stated:

1. "Judge, I haven't denied any time owing this tax to these boys, and I didn't know at the time my tax was turned in that I owed it then." (R. 23)

2. "No, sir, I did not intentionally do it, no sir." (R. 25)

Put on notice that petitioner denied having committed an essential element of the crime with which he was charged, the Court was without power to enter judgment against petitioner.

The Fifth and Sixth Amendments stand as a jurisdictional bar to a valid conviction, and if the requirements thereof are not complied with, the Court does not have jurisdiction to proceed. *Johnson* v. *Zerbst,* supra, *Moore* v. *Dempsey,* 261 U.S. 86, 43 S. Ct. 265, *Mooney* v. *Holohan,* 294 U.S. 103, 55 S. Ct. 340. When petitioner specifically denied the essence of the crime charged, the trial court had no alternative, but to proceed in the manner provided by the Fifth and Sixth

Amendments to the Constitution. Its conviction in violation thereof is a nullity and the failure of the Court of Appeals to treat it as such constitutes a danger to the safeguards provided in the Constitution.

III.

The Decision of the Court of Appeals Affirming the Action of the District Court Is So Far a Departure From the Accepted and Usual Course of Judicial Determinations as to Call for An Exercise of the Court's Supervision

Although serious questions affecting human rights were involved, both the District Court and the Court of Appeals treated the motion for leave to withdraw plea as though it were a civil controversy to be decided on the basis of an unrelated equitable doctrine involving procedures. Both Courts displayed concern for the rights of the government, but the constitutional rights of petitioner were not mentioned by either Court.

The District Court found that Russell's conduct was unethical and that having turned in his client to be prosecuted, he should not have accepted employment to defend him, (infra 5a), and that an injury had been done to petitioner (infra 8a). Yet, it regarded the matter as a controversy between Russell and petitioner, ignoring petitioner's rights. Notwithstanding the District Court's determination with respect to Russell, the Court of Appeals stated that petitioner had "two lawyers who, according to the District Court, rendered 'conscientious and capable services' ". (infra 12a). The District Court found merely that Glover "endeavored to give the defendant Carter conscientious and capable service," (infra 6a) disregarding Glover's insistence that petitioner plead guilty against his own convictions. Also, ignored was Glover's failure to act

when petitioner upon arraignment categorically denied commission of the crime of tax evasion.

An equitable doctrine should have no bearing on the determination of petitioner's rights in a criminal case. The acceptance of petitioner's plea in disregard of his specific denials cannot be charged to petitioner. He entered a denial to every question asked by the Court pertaining to willfulness and intent. A court is not relieved of its duty to refuse to accept a plea without first determining it is intelligently made solely because accused is represented by counsel. Rule 11, Federal Rules of Criminal Procedure, infra, 4, *U. S.* v. *Davis* (C.A. 7), 212 F. 2d 264.

The District Court implied that it might have been inclined to grant the motion had it been made within a reasonable time, but denied the motion because of unreasonable delay (infra 9a) for the reason that the government cannot now be restored to where it was three years ago (infra, 8a 9a). There is no evidence to support this statement. The record does not disclose that any of the government's witnesses have become unavailable or that the government would be prejudiced by the motion.

The District Court states that limitations has run on the government's claim for taxes (infra 9a). The Court of Appeals states that petitioner will claim a refund of these taxes if the motion is granted (infra 12a). In cases of fraud there is no statute of limitations on the government's right to assess taxes, (26 U.S.C. (1939) Section 276(a), infra 4) and it is not illegal, nor improper to claim a refund of taxes, if the taxpayer believes they were erroneously collected.

The Court of Appeals was constrained to affirm the District Court on the unwarranted assumption that petitioner seeks to plead the statute of limitations against further prosecution. Petitioner's sole purpose is to withdraw his plea of guilty and enter a plea of not guilty to the information which was timely instituted against him and stand trial on the offenses charged therein. There is no statutory bar to the prosecution of petitioner under the present information. Title 26 U.S.C., (1939) Section 3748(a) (infra 4).

Without mention of the violation of petitioner's rights under the Constitution, the District Court decided, and the Court of Appeals affirmed the case on the basis of speculative injury to the government. The Court of Appeals found no proof of manifest injustice (infra, 12a). Can there be a greater manifest injustice than a disregard of due process and the violation of an accused's right to counsel? This Court stated in *Johnson* v. *Zerbst*, supra, at page 467:

> "* * * Of the contention that the law provides no effective remedy for such a deprivation of rights affecting life and liberty, it may well be said—as in Mooney v. Holohan, 294 U.S. 103, 113, 79 L. ed. 791, 794, 55 S. Ct. 340, 98 A.L.R. 406—that it 'falls with the premise.' To deprive a citizen of his only effective remedy would not only be contrary to the 'rudimentary demands of justice' but destructive of a constitutional guaranty specifically designed to prevent injustice."

The indifference manifested by the District Court and the Court of Appeals to the points raised concerning the solemn protection guaranteed to an accused by the Constitution, eloquently bespeak the interven-

tion of this Court with its supervisory powers to preserve and protect the constitutional administration of criminal law.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

No. 12,631 Criminal

UNITED STATES OF AMERICA

v.

BERNARD BUFORD CARTER

Opinion of the Court

The defendant B. B. Carter moves the Court to allow him to withdraw a plea of guilty entered and upon which sentence has heretofore been passed.

On the 17th of January, 1951, the movant, B. B. Carter, accompanied by his attorneys, Walter G. Russell and Arthur Glover, appeared in Court along with the District Attorney and his assistant and entered a plea of guilty to an information filed charging him with wilfully and unlawfully attempting to evade a large portion of the income tax due and owing by him to the United States of America.

The Court received the plea and listened to the statement of counsel and assessed a penalty by entering a fine of $10,000.00 which was promptly paid.

The defendant Carter, after a lapse of more than three years, now comes to Court and says that he was caused to enter the plea of guilty by the fraudulent representations made to him by his attorneys and by the District Attorney and his assistants and that he was not guilty as charged and should not have entered a plea of guilty but for being misled by those who presented his case in Court.

B. B. Carter, a tenant farmer on the Plains of Texas, during the seasonal and profitable years in producing grain, came in contact with a Mr. Price and his family who operated a bank at Stratford. Price had large areas of land under his control. Price testified that Carter handled it successfully and established a credit with his bank of as much as $300,000.00.

After he had operated the farm for some time his banker called his attention to the fact that he had better look to his income tax reports, since large sums of money were passing through his account, and referred him to Walter Russell of Amarillo as a proper and competent accountant to make up his income tax.

The defendant Carter kept no books; his bank books, his canceled checks, his deposit slips and his memory are the source of information from which the reports were made. On one occasion the banker Price in conversation with accountant Russell called Russell's attention to gossip among the employees of his bank in which some of the young lady employees in the bank had observed that Carter, with all the money he was handling, was not paying any larger income tax checks than they were paying.

Russell says he thought about this some time and on one occasion in conversation related it to United States Revenue Agent Dubbs. The record does not disclose that Russell disclosed any facts and figures to the agent, but he called his attention to the reports and gossip.

Defendant Carter with newly employed counsel says that the purpose of Russell was a deep laid scheme to get his client Carter into trouble for the purpose of representing him and collecting a large fee.

Russell says that he worried about the matter and decided it was his duty to report the matter to the government, and in support of such he submits the reasoning

of Wigmore and others on the subject of privileged communication:

"Its benefits are indirect and speculative; its obstruction is plain and concrete . . . It is worth preserving for the sake of general policy; but it is none the less an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its general principle." (Wigmore on Evidence, Second Edition, Vol. 5, Sec. 2291).

"If he is employed as an attorney in any unlawful or wicked act his duty to the public obliges him to disclose it; no private obligations can dispense with that universal one, which lies on every member of the society, to discover every design which may be formed, contrary to the laws of the society, to destroy the public welfare." (Annesley v. Earl of Anglesia, 17 How. St. Tr. 1229).

On the question of actual fraud, the Court must consider the deductions sought to be made that Russell reported his client for personal gain in order to collect a large fee. We must consider further Russell's statement that he considered it his duty. Then there may have been other elements that entered into the mind of Russell, such as fear of public opinion resulting from gossip, that induced him to report his client to the agent. We can only arrive at the purpose of Russell by considering it in the light of the rules that control circumstantial evidence, the question being did his conduct amount to actual fraud.

Some years or more went by and another agent of the government, becoming possessed of the statement that had been made to Dubbs, made an investigation of the income and tax liability of the defendant Carter. This investigation seems to have been rather an extended one and all the facts and figures assembled by such investigation together with all the reports that had heretofore been made by defendant Carter were mailed ostensibly from one

department of the government to another. Instead of being delivered to the government office as desired, by some error they were delivered to the mail box of the defendant Carter. He got it out and found it to be a report touching on his income tax status. One of the first passages in the report advised him that the report stemmed from information originally obtained from his accountant, Walter G. Russell. He says he studied the report for a day or more or maybe into the night and confronted Russell with it, that he and Russell then discussed what they were going to do with it. He says that Russell told him to burn it up, but to first make a copy. The defendant did have his daughter to make several copies and then he himself studied the contents of the report of the revenue agent. He did not burn the original nor the income tax report and he and Russell discussed the matter as to whether the government could prosecute him without the evidence, and all the evidence was there in their possession meaning principally the various income tax reports.

In course of time Carter was advised that the government intended to submit his record for prosecution on the basis of being wilfully guilty of attempting to conceal or defraud in the payment of his taxes. This letter was discussed between Carter and his counsel Walter G. Russell. Carter also discussed his tax situation with another attorney, Byron Singleton.

Carter and Russell agreed that it would now be necessary to employ counsel to defend him against the criminal charges brought by the government. After discussion it was agreed between him and Carter that Russell's firm would undertake the defense. A young attorney, Arthur Glover, was called into the conference and it appears that Glover was to be the Courthouse or trial lawyer in handling the case. A fee of $10,000.00 was arranged and $5,000.00 of it paid. In the ultimate division of the fee, Russell received for his part one-half of the total.

In reporting Carter to the United States Revenue officer, we are not prepared to say that Russell had in mind a long range scheme to defraud in ultimately collecting the fee that he finally received. Such conclusion can only be reached by circumstantial evidence, and some two or three other motives or purposes are just as tenable as the one presented. We do not think that it can thus be established by circumstantial evidence that the report made to the revenue officer, although unethical as it may have been, can be sustained under the rules of circumstantial evidence to establish actual fraud. However, if Walter G. Russell made the report to the revenue agent on his client because he felt that it was his duty to his government as a citizen and having been a former revenue officer himself, we think he could have done so believing and feeling that it was his duty. But having turned in his client to be prosecuted by the government because he felt it was his duty to do so, we cannot understand how he felt free to accept employment to defend him.

It might be said to the credit of his associate, Arthur Glover, that Russell at the time that they accepted the employment did not disclose to Glover all of his previous dealing with Carter nor did he say anything about the government files falling into his and Carter's hands. We do not feel that Russell was free to accept this employment as a lawyer and we believe that there be lawyers in the profession who if confronted with this situation would as a matter of good conscience have returned at least his half of the fee, the amount of $5,000.00, to his client.

Glover went ahead with the case and after he had worked on it perhaps a year or more Carter told him about the secret investigation papers which he had hidden in his possession. Up to this time neither Carter nor Russell had done so. Glover continued to work on the case and to all appearances from the papers he prepared they were offered in evidence and from his general management and

conduct in the matter he endeavored to give the defendant Carter conscientious and capable service.

"Actual fraud is intentional fraud . . . it consists in deception, intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed" . . . 37 CJS 210.

"Constructive fraud is a breach of legal or equitable duty which, irrespective of the moral guilt of the fraud feasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests. Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud."

For the reasons above stated tested by the rules of circumstantial evidence in arriving at the purposes and motives of men, we are unable to find that there is actual fraud in the case.

The question of legal or constructive fraud, however, is a more serious question. But before passing upon that we might observe two other elements which enter into this case.

First, Walter Russell and B. B. Carter had equal knowledge of what they were about to do. Together they had made up the income tax reports. Together they had concealed the government file. Together they had consulted about an attorney to defend the case. We are impelled to the conclusion that Carter knew everything that Russell knew.

"Where the parties deal upon equal terms, one who has failed to avail himself of means of knowledge readily within his reach cannot as a rule complain of the other party's representations, and this is especially true where the falsity of representations is obvious" . . . 26 CJ 1149, Sec. 68.

"One can secure no redress for a representation which he knew to be false" . . . 26 CJ 1135, Sec. 55.

It is true that Carter was not a lawyer or a banker or a college man, but he had business sense and understanding. According to the report which was submitted undeniedly at the time of his plea of guilty, he had taken large checks coming in to him and indorsed them over for payment of tracts of land so that there would be no trace of any record in his possession or perhaps in his bank's possession of his having received such money as a portion of income. And in this way large sums of money had escaped taxation. He understood how to do these things. He had built up a credit with his bank of some $300,000.00. He had prospered. He argued long and understandably with his counsel on the better course to pursue and finally agreed with them to enter a plea of guilty and throw himself upon the mercy of the Court.

The information to which he entered his plea of guilty consists of six counts, the first of which charges that on or about March 15, 1945, that one Bernard Buford Carter did wilfully and unlawfully attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America.

Count 2 in similar language presented a charge that he did wilfully and unlawfully attempt to evade the tax of Mrs. Tommie Velma Carter.

Count 3 charges that about March 10, 1947 that he did wilfully and unlawfully attempt to evade and defeat a large part of the income tax due.

Count 4 was one where a similar charge was made of an attempt to evade the income tax due by his wife.

Count 5 charges that about March 15, 1948 he did wilfully and unlawfully attempt to evade and defeat a large part of the income tax due.

Count 6 charges that on or about March 15, 1948 he did wilfully and unlawfully attempt to evade and defeat a large part of the income tax due and owing by him.

According to the weight of the testimony, this was gone over with Mr. Carter and the District Attorney. He did enter then into Court in company with his counsel and a plea of guilty was entered.

We cannot conclude from the facts and attending circumstances that he was unable to understand or comprehend just what he was doing. We believe that he did. We believe that the defendant Carter and counsel Russell equally understood everything they had done and that was being done.

Another element in the matter that we feel should be considered was the long delay in presenting this motion to withdraw his plea. Why should it have taken him better than three years to discover that his lawyers had dealt unfairly with him?

A motion of this type is presented to the sound discretion of the Court. The Court, however, must be careful not to abuse such discretion. U.S. vs. Vidaver, 73 F Supp 382.

We feel that in the exercise of his discretion in matters of this kind where an injury has been done that it would be the duty of the Court to restore the parties as nearly as might be to the position they occupied before the date of the alleged injurious transaction. Where time intervenes so that the Court cannot make such restoration, then the very purpose of making such restoration may be unjust to other parties, to even third parties. If there was a wrong done, the wrong lay between Carter and his counsel. The United States Government was a very important party to this matter and the status of the government cannot be now restored to where it was three years ago when this plea of guilty was made.

". . . in order to excuse an otherwise unreasonable delay in seeking relief . . ., the fraud must have been actual and not merely constructive" . . . 21 CJ 245.

". . . changes occur in the subject matter of the transaction in suit or in the relative positions of the parties thereto, as a result of which it is impossible to place the parties in status quo, and the enforcement of the right would work inequity, relief will be denied because of laches." 21 CJ 231.

By allowing a matter to rest three years the limitation runs on the government's claim for taxes and the government's witnesses may become unavailable.

Had this motion been made within a reasonable time before the status of the parties had undergone this change, we believe that it would have presented an altogether different appeal to the Court, but as the matter now stands we think it well nigh impossible to restore all parties to their former status and we feel that in the exercise of the Court's discretion in this matter he should be motivated and ruled to a large measure by the same principles of equity that would control in a civil controversy.

The Court exonerated the District Attorney's office of any fraud or wrongdoing, which the defendant Carter and counsel agreed to be correct.

It should be borne in mind that the controversy is not to dispose of a matter between Russell and Carter, but rather between Carter and the United States.

The motion to withdraw the plea of guilty must be denied because of the unreasonable delay.

(Signed) T. WHITFIELD DAVIDSON,
United States District Judge.

Opinion rendered October 30, 1954.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15,467

B. B. CARTER, *Appellant*,
v.
UNITED STATES OF AMERICA, *Appellee*.

Decided June 30, 1955

Appeal from the United States District Court for the Northern District of Texas.

Before Hutcheson, Chief Judge, Jones, Circuit Judge, and Wright, District Judge.

Per curiam:

On January 17, 1951, appellant entered a plea of guilty to each count of an indictment in six counts charging an attempt to evade his and his wife's income taxes for the years 1944, 1946, and 1947. The total evasion for those years amounted to $30,677.88. He was sentenced to pay a fine of $10,000. In April, 1954, appellant filed a motion under Rule 32(d), Fed. R. Crim. P., to withdraw his plea of guilty entered January 17, 1951 on the ground that he was improperly advised and misrepresented by his counsel at the time of the entry of the plea.

The district court denied the motion, holding that at the time of entry of the plea Carter's counsel "rendered conscientious and capable service" and that Carter "understood and comprehended just what he was doing."[1] The

[1] The opinion of the district court reads in part:

"It is true that Carter was not a lawyer or a banker or a college man, but he had business sense and understanding. According to the report which was submitted undeniedly at the time of his plea of guilty, he had taken large checks coming in to him and indorsed them over for payment of tracts of land so that there would be no trace of any record in his

court also held that Carter waited until the statute of limitations barred further prosecution in the matter before filing his motion, appellant having contended in the district court that he was misrepresented by his lawyers not only in entering his plea of guilty but also in agreeing to prosecution by information rather than by indictment.

The record shows that Carter had two lawyers, both of whom were also accountants, representing him at the time he entered his plea of guilty. In addition, by some fortuitous but singularly suspicious circumstance, Carter received in the mail prior to entering his plea, the original copy of the Confidential Report of the Bureau of Internal Revenue, on which report his prosecution was based. This report contained all of the evidence on which the Government depended for conviction had Carter gone to trial.

After Carter pleaded guilty and paid his fine, he retained still a third lawyer to represent him in connection with his tax affairs. Carter's present counsel account for the fact that Carter's third lawyer did not seasonably move to withdraw Carter's plea of guilty by charging him with incompetence. Carter's present counsel also deny that they purposefully waited until the statute of limitations had run on the offenses charged before filing their motion to withdraw his plea of guilty, although it is a fact that the motion was filed within thirty days after the statute had run. After some apparent reservations about the matter, they do finally admit, however, in their reply brief filed after argument of the case on appeal, that their real purpose in attempting to set Carter's conviction aside is to

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possession or perhaps in his bank's possession of his having received such money as a portion of income. And in this way large sums of money had escaped taxation. He understood how to do these things. He had built up a credit with his bank of some $300,000.00. He had prospered. He argued long and understandingly with his counsel on the better course to pursue and finally agreed with them to enter a plea of guilty and throw himself upon the mercy of the Court."

improve Carter's chance of obtaining a tax refund for the years in question.

The motion to withdraw plea of guilty under Rule 32(d) is directed to the sound discretion of the district court. *Mitchell v. United States*, 5 Cir., 179 F. 2d 305. After sentence, it should be granted only "to correct manifest injustice."[2] Rule 32(d) Fed. R. Crim. P. We are unable to find that the district court here abused its discretion in refusing to grant the motion. On the contrary, we find in the record no proof of manifest injustice requiring the permission to withdraw the plea. Carter was better prepared to protect himself on arraignment, and more informed, than most defendants. He not only had two lawyers who, according to the district court, rendered "conscientious and capable service" but also a complete outline of the Government's evidence against him as contained in the Bureau of Internal Revenue's Confidential Report. He was certain a jury would convict him. So he pleaded guilty and threw himself on the mercy of the court. The court compassionately imposed only a fine where under the law and under the circumstances of the case a prison sentence as well could easily have been imposed. Now he asks this court to find that the district court abused its discretion in refusing to let him withdraw his plea of guilty so that he can plead the statute of limitations against further prosecution, or in the alternative, reclaim some of the taxes and penalties he has been required to pay.

We find no abuse of discretion.

Affirmed.

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[2] Rule 32(d) reads:

"(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

Judgment

Extract from the Minutes of June 30, 1955

No. 15467

B. B. CARTER

VERSUS

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

Order Denying Rehearing

Extract from the Minutes of August 12, 1955

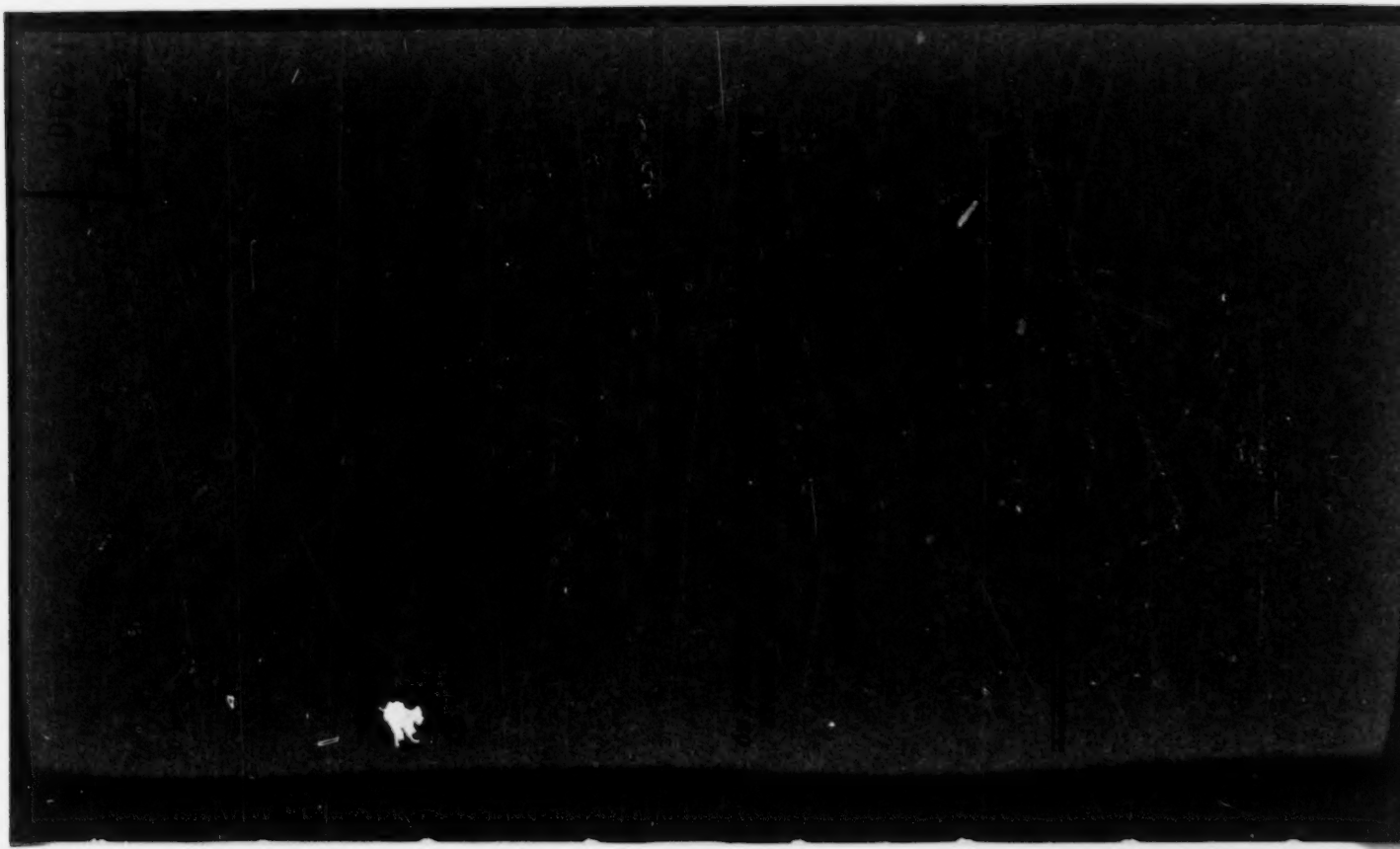
No. 15467

B. B. CARTER

VERSUS

UNITED STATES OF AMERICA

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.



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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 457

B. B. CARTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

Neither the opinion of the District Court (Pet. App. 1a–9a; R. 519–529) nor the *per curiam* opinion of the Court of Appeals (Pet App. 10a–12a) has been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1955. (Pet. App. 13a.) A petition for rehearing was denied on August 12, 1955. (Pet. App. 13a.) On September 6, 1955, the time for filing a petition was extended by Mr. Justice Clark to October 10, 1955, on which day the petition was filed. The jurisdiction of this

Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

Petitioner entered a plea of guilty to an information charging him with wilful attempts to evade income taxes. He was fined $10,000, but no sentence of imprisonment was imposed. Over three years later he asked leave to withdraw the plea. The question is whether the district court was required to set aside the conviction and permit petitioner to withdraw his plea of guilty.

STATUTES AND RULE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

Federal Rules of Criminal Procedure:

Rule 32. *Sentence and Judgment.*

* * * * *

(d) *Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

* * * * *

STATEMENT

On January 17, 1951, an information in six counts was filed against petitioner in the District Court for the Northern District of Texas charging him with wilful attempts to evade his own and his wife's income taxes for the years 1944, 1946 and 1947, in violation of Section 145 (b) of the Internal Revenue Code of 1939.[1] The amounts of income and the taxes due thereon, as reported and as corrected, were alleged to be as follows (R. 1–7):

	Reported		Corrected	
	Income	Tax	Income	Tax
1944 (husband)	$2,143.18	$227.00	$20,202.26	$7,141.47
1944 (wife)	2,143.17	227.00	20,202.25	7,141.47
1946 (husband)	11,971.16	2,858.59	23,381.00	8,130.38
1946 (wife)	11,971.16	2,858.59	23,380.99	8,130.38
1947 (husband)	21,556.98	7,174.67	27,374.97	10,327.35
1947 (wife)	21,556.98	7,174.67	27,374.96	10,327.35

[1] The date of the information is mistakenly given as January 17, 1954 on page 1 of the record.

On the day the information was filed petitioner appeared in court with counsel, waived indictment (R. 7–10), pleaded guilty (R. 11), and, after the court had heard statements from the prosecutor, defense counsel and petitioner himself (R. 11–27), was fined $10,000 (R. 27–30). The fine was paid the same day (R. 110).

Over three years later, in April 1954, petitioner filed a motion to be allowed to withdraw his plea of guilty, alleging that he had never intentionally evaded the payment of taxes, that his waiver of indictment and plea of guilty had been induced by misrepresentations on the part of his own counsel and the United States Attorney,[2] and that, when he entered the plea of guilty, he denied that he had acted either intentionally or wilfully (R. 30–58). After a hearing lasting four days (R. 66, 448, 537), and after consideration of briefs filed by counsel (R. 519, 537–545), the district judge denied the motion (R. 519–529), finding that petitioner understood what he was doing when he entered his plea of guilty (Pet. 8a). The Court of Appeals, finding no proof of manifest injustice requiring withdrawal of the guilty plea, unanimously affirmed. (Pet. 10a–12a).

The Government's evidence may be summarized as follows:

Petitioner's returns. Petitioner, who had been

[2] Counsel for petitioner stipulated at the hearing that there was no misconduct whatsoever on the part of the prosecutor. (R. 446–448.)

a poor tenant farmer, suddenly began to be very prosperous about 1940. Since he had never previously filed an income tax return and since his education was elementary, his banker, L. M. Price, recommended that he consult an accountant-attorney, W. G. Russell, whose office thereafter prepared returns each year, up to and including 1950, by assembling the pertinent information from bank statements and cancelled checks brought in by petitioner. (R. 68–73, 312–319.) After the returns for 1941, 1942 and 1943 had reported net taxable income of $12,700, $38,700 and $29,000, respectively, Russell became suspicious when the first draft of the 1944 return disclosed a net loss, despite the fact that petitioner had harvested an exceptional crop that year, and close questioning of petitioner by Russell ultimately resulted in the return of a profit of about $4,000. (R. 318–321, 415–416.) The comparatively small size of petitioner's income tax check, however, excited the interest of a bank employee, and Price warned Russell that something must be wrong. (R. 321–322.) In addition, there were numerous rumors in the community, relayed to Russell by Price, that petitioner had not been reporting all his income, and petitioner apparently openly boasted that he had not. (R. 205–207, 215–216, 230–231, 259, 323–324.) In preparing the returns for 1945 and 1946, Russell advised petitioner of the rumors, warned him that he must report all his

income, repeatedly asked whether there was other income which did not show up in the bank statements and cancelled checks, and was assured by petitioner that all of his income was run through his bank account.[3] (R. 323–325, 334, 372, 381.) Petitioner complained to the bank about permitting information to leak out as to the size of his income tax payments. (R. 306.)

Petitioner admittedly received large amounts of income during the three prosecution years which he did not deposit in his bank account, and which did not, therefore, come to the attention of Russell's office for inclusion in the returns. In some instances firms to which petitioner had sold cattle or grain were instructed by petitioner to make out checks in the name of third parties from whom petitioner was purchasing land. In other instances a portion of the proceeds of a check received by petitioner from the sale of cattle or grain would be applied in payment of his bank loan and only the remaining portion would be entered on a deposit slip and run through his account. This unorthodox banking procedure was adopted on petitioner's specific instructions. (R. 230–231, 236, 263–264, 328–329, 417–425.)

The investigation. Sometime in late 1946 or early 1947, Russell, allegedly alarmed by the continual rumors, called them to the attention of a revenue

[3] Russell's questioning elicited the fact that one item of $92,000 had not been put through the bank, and this was then included in the 1946 return. (R. 324–325.)

agent. (R. 252–255, 325–328, 332, 381–382.) An investigation was begun in July 1947; petitioner was questioned; evidence of criminal fraud was discovered; and a special agent was assigned to investigate the case in August. (R. 74, 185, 255–268.) About the same time Russell, also, finally learned definitely that petitioner had not been reporting all his income. He immediately advised petitioner, recommended the filing of amended returns, and, in an effort to forestall criminal proceedings, notified the agent who had begun the investigation that corrected returns would be filed. However, when Russell learned that a special agent had been assigned to the case, he said he warned petitioner that prosecution and a prison sentence were possible, and that the filing of amended returns should be abandoned since it might constitute an admission of guilt. (R. 267–268, 328–330, 337–338, 368, 370.) During the ensuing investigation a statement was taken from petitioner in September 1948, at which time he was advised of his privilege not to answer any question that might tend to incriminate him. (R. 77–78, 151.)

In January 1949 the confidential investigative report of the revenue agents, including the original income tax returns, was, by error, mailed to petitioner. The report stated that the investigation had been initiated by information furnished by Russell, and it concluded by recom-

mending criminal prosecution. (R. 81, 87, 136, 147.) When petitioner confronted Russell with the report, Russell admitted that he had called the rumors to the attention of the agents and said he pointed out that he had previously mentioned to petitioner both the rumors and the fact that he had discussed them with the agents. (R. 333–335, 364.) The report was gone over in detail; petitioner's attention was called to the recommended criminal proceedings; and the advisability of hiring counsel was discussed. According to Russell, petitioner wanted to destroy the report in the belief that the Government could not convict him without the original returns, but Russell warned him that the report was Government property and advised that it be retained until called for. (R. 335–337.)

In November 1949 petitioner was informed by the Treasury Department that prosecution had been recommended. (R. 338–339.) He again discussed the problem of counsel with Russell, and suggested that Russell represent him. Russell, however, suggested his associate, Arthur Glover, and the latter, after some preliminary investigation, agreed to take the case. From that point Glover made all decisions, although Russell was kept informed and shared the fee.[4] (R. 339–342, 364–365, 393–394, 387–394, 437.)

[4] Russell was not a trial attorney. (R. 438.) Glover, although still an employee of Russell at the time he entered the case, was already in the process of becoming a partner in Russell's law firm. (R. 461–463.)

The proposed defense. Having concluded that the fact of substantial amounts of unreported income was indisputable,[5] Glover endeavored to build his defense on lack of intent, and attempted to show that the omissions were the result of petitioner's ignorance and carelessness, the bank's unorthodox methods of recording his deposits, and improper preparation of the returns by Russell's accounting employees. (R. 398–401, 405, 407.) Petitioner was fully aware that this was the proposed defense, understood that the prosecution had a heavy burden of proof to establish that his omissions were willful, assisted Glover in preparing a written summary of this defense, and complimented him on the finished product. (R. 132, 392–393, 399–400, 404, 408.) Glover presented this argument and the written summary, unsuccessfully, in four or five conferences with the Treasury Department, the Department of Justice and the United States Attorney. (R. 391, 404–405, 407–408, 410–413.) The longer Glover worked on the case, however, the more, said he, he became convinced of the inherent weakness of the defense of lack of willfulness. (R. 401–403, 414–425.) There were many items for which petitioner could give him no satisfactory explana-

[5] Glover did not learn of petitioner's possession of the confidential report until about two months after he had been called into the case. (R. 395–397.)

tion (R. 401–402, 420–421), and he was aware that there was at least one witness who might testify as to petitioner's boasts (R. 206–207, 419–420, 423, 472–473). Furthermore, despite the fact that the Government did not have the original tax returns, he was aware that Russell, who had acted only as an accountant in preparing the returns, could be subpoenaed to produce the retained copies. (R. 403–404.) He also discovered that petitioner had failed to report some income for the year 1947 when he was well aware that the investigation was in progress. (R. 417.) After having been informed by the United States Attorney that the case would be presented to a grand jury, and having finally become convinced both that petitioner was guilty and that a jury would convict him, Glover asked the United States Attorney what sentence might be imposed if petitioner entered a plea of guilty, and was informed that Judge Davidson usually disposed of such cases with a fine only. (R. 411–412, 414.)

On January 10, 1951, Glover discussed the matter at length with petitioner and his wife, said he explained the weakness of petitioner's case, warned that conviction and imprisonment were highly probable, and advised that petitioner would probably escape with a fine by pleading guilty and that he could avoid a great deal of publicity by waiving indictment and pleading to an information. Petitioner did not admit that

he had intentionally failed to report income, but the next morning he informed Glover that he had decided to waive indictment and plead guilty. Glover advised him to obtain at least two character witnesses to appear for him at the time of sentencing. (R. 425–430.)

The plea and sentence. On January 17, 1951, petitioner, Glover and Russell went to the United States Attorney's office where they were furnished with copies of the waiver of indictment and the information, both of which Glover and Russell carefully went over with petitioner. The prosecutor then explained the procedure to be followed in court. (R. 346–347, 430–432.) Subsequently petitioner stated in open court that he understood his right to indictment; he then signed the waiver, and, after hearing the information read, entered his plea of guilty. (R. 8–11.)

The court then proceeded to consider the circumstances of the admitted offenses in order to determine the sentence to be imposed. The prosecutor read a summary of the Government's evidence (R. 12–17, 275); Glover made a plea for leniency (R. 17–19); and the two character witnesses testified (R. 20–23). The court then asked whether petitioner desired to say anything in his own behalf "by way of mitigation or explanation." (R. 23.) Petitioner admitted that he had failed to report income, but he said that he

"just forgot to turn it in." The court said (R. 24–25):

> I will state it to you in a different form. The Court never wants any man to plead guilty unless he feels himself to be guilty, and if you feel yourself to be innocent, then we think you should be tried, and tried by a jury.
>
> The DEFENDANT:
>
> I think I am guilty through neglect of my business, Judge, that is the only reason I am pleading guilty.
>
> The COURT:
>
> You mean to say you are not willfully guilty, and did not intentionally break the law?
>
> The DEFENDANT:
>
> No, sir, I did not intentionally do it, no, sir.

In response to this statement, the court, after expressing its sympathy for one who had come up the hard way, as had petitioner, stated (R. 26):

> Getting down to the particular facts of your case, a man can sometimes justify himself in his mind, when he may not be justified in law. You may feel like, during the early years of your life when living was hard and the depression was on, that you made no money, and what little you made, you lost it pretty soon and then, when the good years came along, that you were entitled to acute [*sic*] something. There is some justification in that, but

you cannot break the law, in order to do it.

When you do, then you have to confront the Court, just like the rest of the men.

After noting that petitioner had evaded taxes on about $60,000 in income by using current receipts to purchase assets without running the receipts through the bank account which was used as the basis for his income tax returns (R. 26), the court said (R. 27):

It looks like you did that intentionally. By the time though that you get your delinquent tax all paid, you are going to be left almost a poor man again. The Court does not quite find it in his heart to send you to the penitentiary, yet, the circumstances justify a considerable punishment by the way of a large fine. When we assess this fine, we wouldn't want any trouble about the collection.

What is your financial situation at this time? Are you able to pay a good fine?

The DEFENDANT:

I went to my bank yesterday morning, Judge, I have got around four thousand dollars in the bank, between four, and forty-five hundred.

The court then asked whether petitioner could pay a fine of $10,000; petitioner assured the court that he could; sentence was imposed; and the fine was paid the same day (R. 27–30, 433.)

Petitioner was "very happy" after the sentencing. (R. 354, 433.) Glover continued to repre-

sent him in various legal matters for several months, and effected an agreement as to the amount of petitioner's civil tax liability. (R. 354–355, 438–441.) In the following August, however, petitioner, apparently in the hope of reducing this civil liability, transferred his file to another tax attorney named Singleton. (R. 125, 127, 159–162.)

Petitioner's testimony. The foregoing is the Government's version. Petitioner's statement of the facts (Pet. 5–13) relies chiefly upon his own testimony at the hearing on the motion to withdraw the plea of guilty, and that testimony was in sharp conflict with the testimony of Government witnesses on many points. Petitioner, for example, denied that he had ever given instructions to the bank not to enter on his deposit slips those portions of his cattle and grain checks used to pay off his bank loans (R. 72–73); he stated that when he first learned of the investigation in July 1947 he directed Russell to prepare amended returns and denied that he had ever been told why Russell did not do so (R. 75–76); he denied that he had ever been informed that he was being investigated for fraud until he received the agents' confidential report in January 1949 (R. 77); he stated that Russell, when confronted with the reference to his contact with the agents at the outset of the investigation, said that the agents were liars and advised him to make copies of the report and then burn the original (R. 81–82); he denied that he had ever heard that a criminal

prosecution was possible until about two months before he pleaded guilty[6] (R. 113–115, 135); he denied that anyone had ever explained to him, prior to the entry of the plea, that the Government had to prove that he had "wilfully" evaded his taxes (R. 103–104); he denied that he had been told that he would be required to waive indictment (R. 105, 116); he denied that he had been told he would have to appear in court (R. 116); and he denied that Glover and Russell had gone over the information with him before entering the court room on the morning of the plea (R. 157). He admitted that he had decided to enter a plea of guilty because of Glover's warning that he would probably go to the penitentiary if he did not. (R. 103, 123, 170.) He offered no satisfactory explanation of the fact that he had directed purchasers of grain and cattle to draw checks payable to third parties from whom he was buying land.

DISCUSSION

Rule 32 (d) of the Federal Rules of Criminal Procedure (*supra*, p. 3) provides that a motion to withdraw a plea of guilty "may be made only before sentence is imposed * * *; but *to correct manifest injustice* the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea." (Emphasis

[6] He admitted, however, that in January 1949 he had received and studied the confidential report which concluded with a recommendation of prosecution. (R. 81, 136–137.)

added.) It is settled that a motion under the Rule is addressed to the discretion of the court, and that the movant bears the burden of showing "manifest injustice."[7]

The lower courts treated this as a case in which a defendant had entered a plea of guilty valid on its face. If the record could fairly be read as showing such a plea the Government would contend, in opposition to certiorari, that petitioner failed to sustain the burden of showing manifest injustice.

The Government, however, is constrained to confess error because, in our view, the record on its face does not show an unqualified plea of guilty. What the record does show is that, in response to specific questions of the trial judge seeking to elicit petitioner's understanding of the meaning and significance of his plea, petitioner stated: "I think I am guilty only through neglect of my business, Judge, that is the only reason I am pleading guilty. * * * I did not intentionally do it." (R. 25.)[8]

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[7] *Kercheval* v. *United States*, 274 U. S. 220, 224; *United States* v. *Panebianco*, 208 F. 2d 238 (C. A. 2), certiorari denied, 347 U. S. 913; *Friedman* v. *United States*, 200 F. 2d 690, 696 (C. A. 8), certiorari denied, 345 U. S. 926; *United States* v. *Shneer*, 194 F. 2d 598, 600 (C. A. 3); *Williams* v. *United States*, 192 F. 2d 39, 40 (C. A. 5).

[8] Earlier in the colloquy with the trial court, petitioner stated (R. 23):

"Judge, I haven't denied any time owing this tax to these boys, and I didn't know at the time my tax was turned in that I owed it, then. I just forgot to turn it

The offense to which petitioner was pleading guilty, *i. e.,* violation of 18 U. S. C. 145 (b), includes wilfulness as an essential element. *Spies* v. *United States,* 317 U. S. 492. If, as he insisted to the trial judge, petitioner was "guilty" only through "neglect" and "did not intentionally break the law", he was, in substance, pleading "not guilty". The trial judge himself had told petitioner earlier in the colloquy (R. 24–25), "if you feel yourself to be innocent, then we think you should be tried, and tried by a jury." It was in response to this invitation that petitioner offered his amplifying and qualifying expressions of innocent intent.

As we read the record, it permits no conclusion other than that petitioner's explicit disavowal of an essential element of the offense contradicted his plea of guilty. This disavowal was never withdrawn. It necessarily constituted a substantial qualification, if not a revocation, of the plea. Thus, although the plea of guilty was expressly negatived by petitioner's unretracted protestations of innocence, the plea was treated as one of guilt and a judgment of conviction entered.

The Government believes it important in the administration of criminal justice that pleas of guilty, which substitute for evidence, shall be genuine and unequivocal. Where a plea is coupled with clear assertions by the defendant of his in-

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in. I didn't keep any books, and I didn't know anything about it, that is all I have got to say about it."

nocence, it is error to base upon it a judgment of conviction, for it is in substance a plea of not guilty. In such a case, we believe, it is the duty of the trial court to direct entry of a plea of not guilty and order the defendant to stand trial. At the very least, the court should undertake to explore more fully the defendant's understanding of his position. Unless thereafter the defendant withdraws his earlier statements inconsistent with guilt and unqualifiedly pleads guilty, the plea of guilty cannot properly be accepted and be made the basis of a judgment of conviction.[9]

Further, in the instant case, the error in accepting petitioner's plea is aggravated by extraordinary facts surrounding his representation by counsel. One of his two lawyers, Russell, had helped prepare the tax returns. Later he furnished the Government with information leading to the prosecution. The other lawyer, Glover, who appeared for petitioner in the district court, was Russell's partner. These circumstances generate a serious doubt, not satisfactorily resolved by the record, as to whether the legal advice on which

[9] See Rule 11 of the Federal Rules of Criminal Procedure:

> A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. * * *

petitioner acted may not have been affected by an interest adverse to his own.

The only remaining question is whether, in view of the finding of the district court, on the motion to withdraw the plea (Pet. 8a), that petitioner understood "just what he was doing" when he entered it, he should be held bound because there would be no "manifest injustice" to him. Both courts below were apparently impressed by the fact that petitioner was then seeking, not merely to withdraw his plea and stand trial, but to escape prosecution altogether by repudiating his waiver of indictment. In this Court, however, petitioner expresses a readiness to stand trial on the offenses alleged in the information, and explicitly asserts that he stands by his waiver of indictment. He states unequivocally in the petition for certiorari (p. 18) that his "sole purpose is to withdraw his plea of guilty and enter a plea of not guilty to the information which was timely instituted against him and stand trial on the offenses charged therein." Thus, there is eliminated a factor which might otherwise weigh against permitting withdrawal of the plea.

The view the Government takes of the facts of this case results in no impairment whatsoever of the salutary rule that where a defendant has entered what is genuinely a plea of guilty and thereafter, after sentence, moves to withdraw the

plea, such a motion, addressed to the discretion of the court, is to be granted only if the defendant sustains the burden of showing that it is required to correct manifest injustice. This case, we believe, does not fall within the rule. Here the record discloses no initially valid plea of guilty. On its face, the plea entered by petitioner was, if regard be had to the substance of his words, a plea of not guilty. Hence a proper foundation for the judgment of conviction was entirely lacking.

CONCLUSION

For the reasons stated, the Government believes that, in view of the unusual circumstances presented, the ends of justice would best be served by a remand of this case to the district court to allow withdrawal of the plea of guilty and to permit petitioner to plead anew to the information.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

DECEMBER 1955.

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No. 457. CARTER *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. *Per Curiam:* The petition for writ of certiorari is granted. On consideration of the entire record and confession of error by the Solicitor General of the United States the judgment of the Court of Appeals is vacated and the case is remanded to the District Court. *John Y. Merrell* and *Daniel S. Ring* for petitioner. *Solicitor General Sobeloff* for the United States. Reported below: 224 F. 2d 563.